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THE EIGHTH AMENDMENT AND PROCEDURES FOR DETERMINING DEATH ROW INMATE SANITY: *FORD v. WAINWRIGHT*, 106 S. Ct. 2595 (1986)

For the past seven hundred years, courts refused to execute presently¹ insane persons.² Although the reasons for this policy are unclear,³ the courts "firmly enshrined"⁴ in the common law⁵ this refusal to execute the insane. Presently, no state with the death penalty allows execution of the insane.⁶ The United States Supreme Court incorpo-

1. The author uses the word "presently" to distinguish between incompetency at the time of the offense and at trial and incompetency at the time of execution. This Comment deals only with a prisoner's incompetency at the time of execution. See Note, *The Eighth Amendment and the Execution of the Presently Incompetent*, 32 STAN. L. REV. 765 n.4 (1980).

2. See, e.g., *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting); *United States ex rel. Smith v. Baldi*, 344 U.S. 561, 569 (1953); *Gray v. Lucas*, 710 F.2d 1048, 1053 (5th Cir. 1983); Note, *supra* note 1, at 778; Hazard and Louisell, *Death, the State, and the Insane: Stay of Execution*, 9 UCLA L. REV. 381 (1962).

3. See, e.g., *Solesbee*, 339 U.S. at 16-19 (Frankfurter, J., dissenting); Hazard and Louisell, *supra* note 2, at 382-89; Note, *supra* note 1, at 778-80; Feltham, *infra* note 5, at 468. To Coke, the execution of an insane man was a "miserable spectacle," and failed to serve a deterrent purpose. COKE, *THIRD INSTITUTES* 6 (1644). To Hawles, the insane person could not be executed because he would be unable to present his best defense. Hawles, *Remarks on the Trial of Mr. Charles Bateman*, 11 STATE TRIALS 474 (1816); accord, 1 HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 34-35 (1736). According to Blackstone, the insane should not be executed for two reasons: first, "madness is punishment in itself;" second, the insane person might be unable to give a reason why he should not be executed, which he might give if he were sane. 4 BLACKSTONE, *COMMENTARIES ON THE LAW OF ENGLAND* 24-25 (1768).

4. Royal Commission on Capital Punishment, *Minutes of Evidence, Dec. 1, 1949*, 13 (1950).

5. For a discussion of the common law background, see generally Feltham, *The Common Law and The Execution of Insane Criminals*, 4 MELB. U. L. REV. 434 (1964) (hereinafter cited as Feltham).

6. 41 of the 50 states have a death penalty. Of those 41, 26 explicitly prohibit execution of the insane. See ALA. CODE § 15-16-23 (1982); ARIZ. REV. STAT. ANN. § 13-4023 (1978); ARK. STAT. ANN. § 43-2622 (1977); CAL. PENAL CODE ANN. § 3703 (West 1982); COLO. REV. STAT. § 16-8-112(2) (1978); CONN. GEN. STAT. § 54-101

rated this general rule into the eighth amendment⁷ in *Ford v. Wainwright*,⁸ holding inadequate Florida's procedure⁹ for determining the

(1985); FLA. STAT. § 922.07 (1985); GA. CODE ANN. § 17-10-62 (1982); ILL. REV. STAT., ch. 38, §§1005-2-3 (1982); KAN. STAT. ANN. § 22-4006(3) (1981); KY. REV. STAT. § 431.240(2) (1985); MD. ANN. CODE, Art. 17, § 75(c) (1985 Supp.); MISS. CODE ANN. § 99-19-57(2) (Supp. 1985); MO. REV. STAT. § 552.060 (1978); MONT. CODE ANN. § 46-14-221 (1977); NEB. REV. STAT. § 29-2537 (1979); NEV. REV. STAT. § 176.445 (1977); N.J. STAT. ANN. § 30:4-82 (West 1981); N.M. STAT. ANN. § 31-14-6 (1984); N.Y. CORREC. LAW § 656 (McKinney Supp. 1986); N.C. GEN. STAT. § 15A-1001 (1983); OHIO REV. CODE ANN. § 2949.29 (1982); OKLA. STAT., tit. 22, § 1008 (1986); S.D. CODIFIED LAWS ANN. § 23A-27A-24 (1979); UTAH CODE ANN. § 77-19-13 (1982); WYO. STAT. § 7-13-901 (Supp. 1985).

Other states, such as Louisiana, Pennsylvania, Tennessee, and Washington adopted the common law rule by judicial decision. *See* *State v. Allen*, 204 La. 513, 515, 15 So. 2d 870, 871 (1943); *Commonwealth v. Moon*, 383 Pa. 18, 22-23, 117 A.2d 96, 99 (1955); *Jordan v. State*, 124 Tenn. 81, 89-90, 135 S.W. 327, 329 (1911); *State v. Davis*, 6 Wash. 2d 696, 717, 108 P.2d 641, 651 (1940). Some states, however, have statutes which are more discretionary in nature. For example, Delaware, Indiana, Massachusetts, Rhode Island, South Carolina, Texas, and Virginia provide for the suspension of sentence and transfer to a mental facility upon a prisoner's development of mental illness. The remaining four states which have the death penalty, Idaho, New Hampshire, North Carolina, and Vermont, lack a specific procedure to deal with condemned insane prisoners. These four states fail to completely abrogate the rule against the execution of those prisoners. *See Ford v. Wainwright*, 106 S. Ct. 2595, 2601-02 n.2 (1986).

7. The eighth amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

8. 106 S. Ct. 2595 (1986).

9. Section 922.07 of Florida's statute provides for this procedure and states in pertinent part:

(1) When the Governor is informed that a person under sentence of death may be insane, he shall stay execution of the sentence and appoint a commission of three psychiatrists to examine the convicted person. The Governor shall notify the psychiatrists to examine the convicted person. The Governor shall notify the psychiatrists in writing that they are to examine the convicted person to determine whether he understands the nature and effect of the death penalty and why it is to be imposed upon him. The examination of the convicted person shall take place with all three psychiatrists present at the same time. Counsel for the convicted person and the state attorney may be present at the examination. . . .

(2) After receiving the report of the commission, if the Governor decides that the convicted person has the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him, he shall issue a warrant to the warden directing him to execute the sentence. . . .

(3) If the Governor decides that the convicted person does not have the mental capacity to understand the nature of the death penalty and why it was imposed on him, he shall have him committed to a Department of Corrections mental health treatment facility.

(4) When a person under sentence of death has been committed to a Department of Corrections mental health treatment facility, he shall be kept there until the

sanity of a condemned prisoner.¹⁰

In *Ford* a Florida state court sentenced to death the petitioner Alvin Ford, a convicted murderer.¹¹ Although Ford was sane both when he committed the crime and at trial,¹² he claimed that he became insane while on death row.¹³ Pursuant to Florida's procedure for determining condemned prisoners' competence,¹⁴ the governor appointed three psychiatrists to examine Ford. After a single thirty-minute interview during which Ford's counsel was unable to cross-examine the psychiatrists or present evidence on Ford's behalf,¹⁵ all three doctors agreed that Ford was competent¹⁶ to be executed.¹⁷ The governor then signed Ford's death warrant.¹⁸

The United States District Court for the Southern District of Florida

facility administrator determines that he has been restored to sanity. The facility and the Governor shall appoint another commission to proceed as provided in subsection (1).

FLA. STAT. § 922.07 (1985).

10. 106 S. Ct. at 2606.

11. Ford previously litigated the validity of his conviction and death sentence. *Ford v. Strickland*, 696 F.2d 804 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 201 (1983).

12. 106 S. Ct. at 2598.

13. Ford believed that he was a Ku Klux Klan conspiracy target and that the Klan designed the conspiracy to force him to commit suicide. *Id.* Ford also believed that the conspirators took his family and friends hostage, and were torturing them somewhere within the prison. *Id.* Later, Ford claimed that he ended the "crisis" by firing a number of prison officials and by appointing new members to the Florida Supreme Court. *Id.* Ford's behavior gradually deteriorated, and he became incomprehensible. *Id.* at 2599. Ford's psychiatrist concluded that Ford suffered from "Paranoid Schizophrenia With Suicide Potential." *Id.* at 2598.

14. FLA. STAT. § 922.07 (1985). See *supra* note 9 for pertinent text.

15. The governor specifically ordered the attorneys to refrain from participation in the examination, in harmony with his policy against advocacy in sanity determination proceedings. *Goode v. Wainwright*, 448 So. 2d 999, 1001 (Fla. 1984).

16. Florida's competency standard is "whether he understands the nature and effect of the death penalty and why it is to be imposed on him." FLA. STAT. § 922.07(1) (1985). As one commentator observed, "[t]o give someone her just deserts implies her recognition that those deserts are just." Gale, *Retribution, Punishment, and Death*, 18 U.C.D. L. REV. 973, 1031 (1985).

17. Two of the three state-appointed psychiatrists found that Ford was psychotic. Nonetheless, they concluded that he was competent to be executed. Brief for Petitioner at 4-6, *Ford v. Wainwright*, 106 S. Ct. 2595 (1986).

18. Ford's counsel submitted certain written materials, including evidence both of Ford's mental illness and of conflicts among the three state-appointed psychiatrists' opinions, to the governor. Brief for Petitioner at 3, *Ford v. Wainwright*, 106 S. Ct. 2595 (1986). The governor failed to indicate whether he considered those materials. He signed Ford's death warrant without explanation or statement. 106 S. Ct. at 2604.

denied Ford's habeas corpus petition,¹⁹ stating that he had no entitlement to a *de novo* evidentiary hearing to redetermine his competency.²⁰ The Court of Appeals for the Eleventh Circuit granted a certificate of probable cause²¹ and stayed the execution.²² After the Supreme Court rejected the state's effort to vacate the stay,²³ the court of appeals affirmed the district court's denial of habeas corpus,²⁴ and the Supreme Court granted certiorari.²⁵

The eighth amendment to the United States Constitution prohibits "cruel and unusual punishment,"²⁶ but fails to further delineate the prohibition's scope.²⁷ This failure forced the courts to develop and apply standards²⁸ for the numerous contexts in which eighth amendment

19. *Id.* at 2599.

20. *Id.*

21. The court granted the certificate because Ford "presented substantial grounds upon which relief could be granted." *Ford v. Strickland*, 734 F.2d 538, 543 (11th Cir. 1984) (quoting *Barefoot v. Estelle*, 103 S. Ct. 3383, 3395 (1983)).

22. 734 F.2d at 543.

23. *Wainwright v. Ford*, 467 U.S. 1220 (1984).

24. *Ford v. Wainwright*, 752 F.2d 526, 528 (11th Cir. 1985).

25. *Ford v. Wainwright*, 106 S. Ct. 566 (1985).

26. U.S. CONST. amend. VIII.

27. In *Trop v. Dulles*, 356 U.S. 86, 99-101 (1958), the Court stated:

The exact scope of the constitutional phrase "cruel and unusual" has not been detailed by this Court. But the basic policy underlying these words is firmly established in the Anglo-American tradition of criminal justice. . . . The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. . . . [T]he words of the Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

See also Weems v. United States, 217 U.S. 349, 369 (1910); *Furman v. Georgia*, 408 U.S. 238, 263 (1972) (Brennan, J., concurring); *Gregg v. Georgia*, 428 U.S. 153, 169-73 (1976); *Robinson v. California*, 370 U.S. 660, 675-77 (1962) (Douglas, J., concurring) (describing various punishments deemed cruel and unusual).

28. The Court developed a two-part standard to determine whether a punishment is cruel and unusual. The punishment must be acceptable to "contemporary standards of decency" and must uphold the "dignity of man." *See Trop*, 356 U.S. at 100-01. *See also Gregg*, 428 U.S. at 173-75. *See generally* Note, *supra* note 1, at 775. The Supreme Court also emphasized that punishment must be proportionate to the crime to be constitutional. *See, e.g., Solem v. Helm*, 463 U.S. 277, 284 (1983); *Weems*, 217 U.S. at 368; *Trop*, 356 U.S. at 100. *But see Furman*, 408 U.S. at 378 (Burger, C.J., dissenting) (the cruel and unusual punishment clause protects only against punishments that are "extremely cruel.")

claims arise.²⁹ Courts had not yet decided whether executing an insane person violates the eighth amendment.³⁰ State legislatures incorporated the common law prohibition against such executions into law³¹ and enacted procedures for determining an inmate's sanity.³²

The eighth amendment did not apply to the states through incorporation into the fourteenth amendment³³ until 1962.³⁴ Therefore, prior to 1962, courts presented with challenges to state procedures for determining sanity based their decisions solely on the fourteenth amendment's due process clause.³⁵ For example, in *Nobles v. Georgia*³⁶ the United States Supreme Court held that due process failed to require a jury trial for determining a petitioner's competency to be executed.³⁷ Instead, the decision of whether a prisoner had a meritorious claim of

29. See *Solem*, 463 U.S. 277 (life sentence without possibility of parole for seventh nonviolent felony conviction held to be cruel and unusual); *Coker v. Georgia*, 433 U.S. 584 (1977) (death penalty for rape conviction was "grossly disproportionate" and therefore cruel and unusual); *Furman*, 408 U.S. 238 (death penalty held cruel and unusual); *Robinson*, 370 U.S. 660 (California statute making drug addiction a misdemeanor punishable by imprisonment violated the eighth amendment); *Trop*, 356 U.S. 86 (expatriation for desertion during wartime constituted cruel and unusual punishment); *Weems*, 217 U.S. 349 (cadena temporal, a punishment involving hard labor in chains and loss of citizenship rights held to be cruel and unusual). But see *Gregg*, 428 U.S. 153 (death penalty does not always violate the eighth amendment); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (state's second attempt at electrocution because first attempt failed did not constitute cruel and unusual punishment); *In re Kemmler*, 136 U.S. 436 (1890) (death by electrocution did not violate eighth amendment).

30. See Note, *supra* note 1, at 766.

31. For a list of these statutes, see *supra* note 6. State courts also recognized the prohibition against executing the presently incompetent. See, e.g., *Ex parte Chessner*, 93 Fla. 590, 112 So. 87 (1927); *People v. Scott*, 326 Ill. 327, 157 N.E. 247 (1927); *State v. Allen*, 204 La. 513, 15 So. 2d 870 (1943); *Hawie v. State*, 121 Miss. 197, 83 So. 158 (1919); *Barker v. State*, 75 Neb. 289, 106 N.W. 450 (1905); *In re Smith*, 25 N.M. 48, 176 P. 819 (1918).

32. The common law lacked an established procedure for determining a prisoner's sanity; it was completely within the judge's discretion. See, e.g., *Nobles v. Georgia*, 168 U.S. 398, 407 (1897); Hazard and Louisell, *supra* note 2, at 389-90. Presently, a few states, such as Louisiana, Pennsylvania, and Texas, still adhere to the common law rule, leaving the matter up to the judge's discretion. Other states, including Arkansas, Georgia, New Hampshire, Florida, and Massachusetts, grant the governor discretion to stay the execution. See Note, *supra* note 1, at 780-81, n.71-72.

33. U.S. CONST. amend. XIV, § 1, provides that no state shall "deprive any person of life, liberty, or property, without due process of law. . . ."

34. *Robinson v. California*, 370 U.S. 660 (1962).

35. U.S. CONST. amend. XIV, § 1. For pertinent language, see *supra* note 33.

36. 168 U.S. 398 (1897).

37. *Id.* at 409.

incompetence was within the judge's discretion.³⁸ The Court argued that if the petitioner had an absolute right to a jury trial, she could avoid execution altogether simply by repeatedly claiming insanity.³⁹

Over fifty years later, in *Solesbee v. Balkcom*⁴⁰ the Supreme Court, citing *Nobles*,⁴¹ upheld Georgia's statute prescribing procedures for determining the sanity of death row inmates.⁴² The statute gave the governor discretion to decide which claims had merit.⁴³ If a death row prisoner's claim had merit, the statute authorized the governor to appoint physicians to examine the prisoner and, in appropriate cases, to postpone⁴⁴ execution.⁴⁵ The Court held that the petitioner lacked a fourteenth amendment right to a judicial sanity determination⁴⁶ because the governor, with the aid of expert physicians, was an appropri-

38. The Court stated that at common law the judge was in a better position to take action, rather than summon a jury and have another trial. *Id.* at 407. For a discussion of different state approaches to the procedural issue, see *supra* note 32 and accompanying text.

39. *Nobles*, 168 U.S. at 406.

40. 339 U.S. 9 (1950).

41. The Court in *Solesbee* stated that *Nobles* required that the judge be given broad discretion in deciding whether to allow evidence of insanity. As this decision was non-reviewable by appellate courts, it was important for the judge to use his conscience and sound wisdom in making the decision. *Id.* at 13.

42. The *Solesbee* Court interpreted GA. CODE ANN. § 26-2602 (1903) which provided in pertinent part:

Upon satisfactory evidence being offered to the Governor that the person convicted of a capital offense has become insane subsequent to his conviction, the Governor may, within his discretion, have said person examined by such expert physicians as the Governor may choose; and said physicians shall report to the Governor the result of their investigation; and the Governor may, if he shall determine that the person convicted has become insane, have the power of committing him to the State Hospital until his sanity shall have been restored. . . .

The current version of this provision is substantially the same as the 1903 version. See GA. CODE ANN. § 17-10-61 (1982).

43. The *Solesbee* petitioner claimed a fourteenth amendment right to a judicial or administrative hearing to determine his sanity, which would require counsel to represent him, cross-examine witnesses, and offer evidence of his insanity. *Solesbee*, 339 U.S. at 13. The *Ford* petitioner claimed the same rights as the *Solesbee* petitioner. See *supra* note 15 and accompanying text.

44. That is, when the court deems the prisoner competent, it will carry out the execution. Therefore, these cases involve the question of when, instead of whether, the execution will occur. *Ford v. Wainwright*, 106 S. Ct. 2595, 2610 (1986) (Powell, J., concurring).

45. GA. CODE ANN. § 27-2602 (1903). See *supra* note 42 for the relevant statutory language.

46. 339 U.S. at 14.

ate tribunal for making this determination.⁴⁷ The Court reasoned that the power to postpone execution is similar to a governor's traditional power to reprieve.⁴⁸ Furthermore, for the governor's discretionary power to be fully effective, and not merely an opportunity for the prisoner to avoid execution,⁴⁹ it was necessary for the power to be nonreviewable.⁵⁰

The Supreme Court reaffirmed its *Solesbee* holding in *Caritativo v. California*.⁵¹ *Caritativo* involved a due process challenge to California's procedure for determining the competency of prisoners to be executed.⁵² California's statute differed from the Georgia statute in *Solesbee*⁵³ because California required that the state prison warden initiate competency proceedings if he reasonably believed⁵⁴ a prisoner to be insane. Thus, in upholding California's statute, the Court in fact extended *Solesbee*⁵⁵ by allowing prison wardens to wield the same powers which courts traditionally entrusted only to governors.⁵⁶

In 1962, the Supreme Court changed the constitutional analysis of

47. The Court deemed the governor an "apt and special tribunal" for making these determinations. *Id.* at 12.

48. *Id.* at 11-12.

49. If the Court entitled the prisoner to a judicial review every time he claimed insanity, he could theoretically avoid execution simply by making repeated claims of insanity. *Id.* at 12-13. The Court discussed this issue in *Nobles*. See *supra* note 39 and accompanying text.

50. According to the Court, granting the state's highest executive nonreviewable discretion is permissible. 339 U.S. at 13. See *supra* note 41 and accompanying text for the *Solesbee* Court's additional statements regarding the governor's discretion.

Justice Frankfurter dissented in *Solesbee*. He disagreed with the argument that the state should have ultimate control over the prisoner's insanity claim. 339 U.S. at 21. Frankfurter argued that as the prisoner has a *right* not to be executed while insane, the determination of insanity must not be discretionary. Rather, the court must base that determination on sound information. *Id.* at 23.

51. 357 U.S. 549 (1958).

52. CAL. PENAL CODE §§ 3700, 3701 (Deering 1980) sets forth California's procedure for determining a condemned inmate's sanity. The statute provides for a jury trial, but only after the prison warden initiates the proceedings.

53. GA. CODE ANN. § 27-2602 (1903). See *supra* note 42 for the relevant statutory language.

54. CAL. PENAL CODE § 3701 (Deering 1980).

55. 357 U.S. at 552 (Frankfurter, J., dissenting) (life and death decisions may now be made on the "mere say-so" of a prison warden).

56. Governors traditionally had the power to reprieve. The *Solesbee* Court stated that the power to postpone is much like the power to reprieve. See *supra* note 48 and accompanying text.

cases involving insane condemned prisoners. In *Robinson v. California*⁵⁷ the Court held that the eighth amendment applied to the states through the fourteenth amendment.⁵⁸ After *Robinson*, therefore, condemned prisoners could challenge state procedures for determining competency to be executed on both eighth amendment and fourteenth amendment grounds.⁵⁹

In *Ford v. Wainwright*⁶⁰ the Supreme Court confronted for the first time the issue of the execution of insane persons under both the eighth and fourteenth amendments. Noting that it failed to decide *Nobles*,⁶¹ *Solesbee*,⁶² and *Caritativo*⁶³ on eighth amendment grounds,⁶⁴ the Court held that the eighth amendment prohibits the execution of prisoners deemed insane.⁶⁵ The common law⁶⁶ and modern statutory law support this holding.⁶⁷

In addition to finding an eighth amendment prohibition against executing insane persons, the *Ford* Court held that Florida's procedure for determining condemned prisoners' sanity⁶⁸ was inadequate to protect this constitutional right.⁶⁹ Therefore, Ford was entitled to a *de novo* evidentiary hearing to determine his sanity.⁷⁰

57. 370 U.S. 660 (1962). A California statute made narcotics addiction a misdemeanor punishable by imprisonment. The *Robinson* Court held that the statute inflicted cruel and unusual punishment in violation of the eighth and fourteenth amendments. *Id.* at 667.

58. *Id.*

59. The first time a petitioner made such a challenge on eighth amendment grounds, he was unsuccessful. See *Goode v. Wainwright*, 731 F.2d 1482 (11th Cir. 1984). However, the United States Court of Appeals for the Eleventh Circuit concluded that *Goode* did not control *Ford*. The Eleventh Circuit distinguished *Ford* from *Goode* because the courts in two prior proceedings found the *Goode* petitioner competent. See *Ford v. Strickland*, 734 F.2d 538, 540 (11th Cir. 1984). *Goode* failed to reach the Supreme Court.

60. 106 S. Ct. 2595 (1986).

61. 168 U.S. 398 (1897).

62. 339 U.S. 9 (1950).

63. 357 U.S. 549 (1958).

64. 106 S. Ct. at 2600.

65. *Id.* at 2602.

66. *Id.* at 2600-01. For a discussion of the common law prohibition against executing insane persons, see *supra* notes 2-5 and accompanying text.

67. *Id.* at 2601-02. For a discussion of modern statutory approaches to the rule against executing insane persons, see *supra* note 6 and accompanying text.

68. FLA. STAT. § 922.07 (1985). See *supra* note 9 for the pertinent statutory text.

69. 106 S. Ct. at 2605.

70. Federal habeas corpus standards, set forth in *Townsend v. Sain*, 372 U.S. 293

The Court found that Florida's procedure inadequately protected Ford's eighth amendment right not to be executed while insane for three reasons. First, the procedure failed to include the prisoner in the truth-seeking process.⁷¹ Second, the prisoner and his counsel lacked an opportunity to cross-examine or impeach the governor's psychiatrists' opinions during their thirty-minute interview.⁷² Third, Florida's procedure placed all decision-making authority in the executive branch.⁷³ After recognizing these defects and the fact that Ford's life was at stake,⁷⁴ the Court concluded that Florida's sanity determination procedure could easily lead to unreliability and prejudice of the petitioner's interests.⁷⁵

Justice Powell concurred in part, but stated that the due process requirements in this context were not as great as the majority believed.⁷⁶ Powell felt that the state's interest in carrying out the sentence was compelling.⁷⁷ Moreover, the state could validly presume Ford's sanity at the time of execution because of his continued sanity throughout the trial and sentencing.⁷⁸ For these reasons, Justice Powell believed that Ford had no right to a full sanity hearing.⁷⁹

(1963) and codified at 28 U.S.C. § 2254 (1966), require such a hearing if the state's factfinding procedure was inadequate or unfair. The statute requires a federal evidentiary hearing if (1) the state court's procedure inadequately affords a full and fair hearing, or (2) the state trier of fact failed to afford the habeas applicant a full and fair fact hearing. 372 U.S. at 313.

71. The statute completely barred the prisoner from presenting his insanity case. 106 S. Ct. at 2604. Although he submitted documentation of his illness to the governor, it is unclear whether the governor considered it. *See supra* note 18 and accompanying text.

72. 106 S. Ct. at 2605. The Court stated that in light of the great possibility of bias and inconsistent results, the ability to cross-examine psychiatrists becomes essential to the discovery of truth. *Id.*

73. *Id.* "The commander of the State's corps of prosecutors cannot be said to have the neutrality that is necessary for reliability in the factfinding proceeding." *Id.*

74. *Id.* at 2606.

75. To avoid such unreliability and prejudice, statutes must freely allow the flow of information. *Id.* at 2606.

76. *Id.* at 2610.

77. The Court validly convicted and sentenced the prisoner; the question, therefore, was not whether, but when the sentence would be imposed. *Id.*

78. The petitioner would have to make a "substantial" showing of insanity to overcome this presumption. *Id.*

79. Justice Powell also noted that because the determination of a person's sanity is subjective, the adversarial process, complete with cross-examination and witnesses, is not the best way to make such a determination. *Id.* at 2611. *Compare* Feltham, *supra*

Justice O'Connor concurred in part. She argued that the eighth amendment fails to prohibit the execution of insane prisoners.⁸⁰ In harmony with Justice Powell,⁸¹ she believed that the due process demands in this context are minimal.⁸² She agreed with the result here, however, because Florida, by prohibiting the execution of insane persons, created an expectation but failed to provide adequate procedural protection for that expectation.⁸³

Justice Rehnquist, joined by Chief Justice Burger, dissented. Justice Rehnquist stated that the majority's holding was inconsistent with the common law because at common law the *executive*, instead of the judiciary, determined whether prisoners were competent to be executed.⁸⁴ Only the governor, with the power to reprieve, should be able to postpone executions.⁸⁵ Furthermore, the dissenters disagreed with the majority's creation of a constitutional prohibition against the execution of prisoners while insane.⁸⁶ In doing so, the dissent rejected the majority's justification that for centuries courts refused to recognize such executions.⁸⁷

The Court in *Ford* made constitutional a long-standing principle that insane persons cannot be executed and held that a state's procedures for determining a condemned prisoner's sanity must meet certain basic standards⁸⁸ to fully protect the prisoner's eighth amendment right. In contrast, *Nobles*,⁸⁹ *Solesbee*,⁹⁰ and *Caritativo*⁹¹ found no constitutional

note 4, at 473. Feltham stated that if doubt exists regarding a sanity determination procedure, the judiciary, whose impartiality is acknowledged, is in a better position than the executive to make the determination. *Id.* Accord Note, *supra* note 1, at 801 (only a judicial inquiry will satisfy the eighth amendment's requirements).

80. *Ford v. Wainwright*, 106 S. Ct. 2595, 2611 (1986).

81. For a discussion of Justice Powell's opinion, see *supra* notes 77-80 and accompanying text.

82. 106 S. Ct. at 2612. To Justice O'Connor, in this context the potential for false claims and deliberate delay is great. The petitioner who continually raised claims of insanity up to the very moment of execution could exacerbate such dangers. *Id.*

83. *Id.* at 2613. The procedure did not provide an opportunity to be heard. *Id.*

84. *Id.*

85. *Id.* at 2614. For a discussion of this argument as initially raised in *Solesbee*, see *supra* note 48 and accompanying text.

86. *Ford v. Wainwright*, 106 S. Ct. 2595, 2615 (1986).

87. *Id.*

88. For a discussion of federal habeas corpus standards, see *supra* note 70 and accompanying text.

89. 168 U.S. 398 (1897).

90. 339 U.S. 9 (1950).

right against executing an insane prisoner. Instead, only the state, as an act of mercy, could spare the insane prisoner.⁹² Furthermore, *Solesbee* and *Caritativo* upheld state procedural statutes nearly identical to that struck down in *Ford*.⁹³ Although *Ford* seems to overrule *Nobles*, *Solesbee*, and *Caritativo* because the Court decided *Ford* on eighth amendment grounds, the prior cases on the fourteenth amendment stand.

Ford is distinguishable from the prior cases because it arose after the Court decided in *Robinson* that the eighth amendment applies to the states.⁹⁴ Although the Court decided the prior cases solely on fourteenth amendment grounds,⁹⁵ *Ford* relied on both the fourteenth and eighth amendments. Thus, the Court interpreted the Constitution to protect both the prisoner's due process rights, and his right to be free from cruel and unusual punishment.

A further distinction between the pre-*Robinson* cases and *Ford* is that the Court in *Ford* granted the prisoner greater procedural protection because his right is constitutional. The prisoners in the pre-*Ford* cases lacked such a right and therefore the statutes involved in the cases prior to *Ford* adequately protected those prisoners. The pre-*Ford* statutes needed only to protect the state's administrative grace.⁹⁶ Florida's statute in *Ford*, although similar to those in the prior cases, was more highly scrutinized to ensure that it protected the prisoner's newly-found eighth amendment rights and not just the state's mercy.

The *Ford* decision will clearly affect states allowing the death penalty. States such as California⁹⁷ and Georgia,⁹⁸ which leave the sanity determination to a state official, must reevaluate and amend their stat-

91. 357 U.S. 549 (1958).

92. For a discussion of the power to postpone execution as an act of mercy rather than a constitutional right, see *infra* note 96 and accompanying text.

93. *Solesbee* involved GA. CODE ANN. § 26-2602 (1903). See *supra* note 42 for the pertinent statutory language. *Caritativo* involved CAL. PENAL CODE §§ 3700, 3701 (Deering 1980). For a discussion of this statute, see *supra* note 52 and accompanying text. *Ford* involved FLA. STAT. § 922.07 (1985). See *supra* note 9 for the relevant statutory language.

94. For a discussion of the difference between pre- and post-*Robinson* cases, see *supra* notes 57-59 and accompanying text.

95. U.S. CONST. amend. XIV, § 1. For pertinent language, see *supra* note 33.

96. See *Solesbee v. Balkcom*, 339 U.S. 9, 11 (1950).

97. CAL. PENAL CODE ANN. § 3703 (Deering 1980).

98. GA. CODE ANN. § 17-10-61 (1982).

utes to incorporate *Ford's* procedural adequacy standards.⁹⁹ States must hold a full evidentiary hearing to determine a condemned prisoner's sanity. Although the Court in *Ford* gave little guidance regarding the exact level of procedural protection required, the Court clearly stated that the prisoner must have a "full and fair hearing"¹⁰⁰ to determine whether she is competent to be executed. Something more than a governor's cursory review is therefore necessary.¹⁰¹

The decision in *Ford* adheres to both common law and modern standards. Since what was once an act of mercy is now a constitutional right, the amount of procedural protection a court affords a death row inmate should increase if the prisoner becomes insane.

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99. Five months after the *Ford* decision, the Florida Supreme Court amended Florida's Rules of Criminal Procedure to incorporate the *Ford* standards. *In re Emergency Amendment to Florida Rules of Criminal Procedure* (Rule 3.811, Competency to be Executed), 497 So. 2d 643 (Fla. 1986).

Rule 3.811 provides:

(a) When proceedings under section 922.07, Florida Statutes (1985), are initiated, and such proceedings result in a determination by the governor that the convicted person under death sentence has the mental capacity to understand the nature of the death penalty and why it is to be imposed upon that person, *a judicial proceeding is authorized* to review that determination. Such a proceeding shall be instituted by a written motion by counsel for the prisoner asserting grounds why a belief persists that the prisoner is not mentally competent to be executed. . . .

The *trial judge shall* review the experts' reports and any written submissions from the parties, including experts representing the prisoner. No evidentiary hearing shall be required, but the trial judge, at his or her discretion, may allow the parties to present oral argument and may permit or require the live testimony of witnesses, including one or more of the experts. . . . [Emphasis added].

FLA. STAT. ANN. RULES CRIM. PROC. § 3.811 (Supp. 1987). Although this new rule empowers the governor to make the initial sanity determination, it gives the trial judge discretion to review those findings and to order an evidentiary hearing if necessary. Thus, the sanity determination no longer lies exclusively with the executive branch. Also, the new rule gives the petitioner a greater opportunity to participate in the proceedings, by allowing her to submit evidence of her own incompetence, and, if the trial judge finds it appropriate, by presenting oral arguments and witnesses.

100. *Ford v. Wainwright*, 106 S. Ct. 2595, 2603 (1986). For a discussion of the standards used in determining whether a hearing is "full and fair," see *supra* note 70 and accompanying text.

101. *Id.* at 2604. The new Florida Criminal Procedure Rule 3.811 seems to provide for more than a cursory review. For a discussion of this new rule, see *supra* note 99.